Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re	)	
DISTRIBUTION OF CABLE	)	**CONSOLIDATED PROCEEDING**
	)	**NO. 14-CRB-0010-CD (2010-13)**
ROYALTY FUNDS	)	
	)	

OPPOSITION OF THE JOINT SPORTS CLAIMANTS TO PROGRAM SUPPLIERS' REQUEST FOR REHEARING OF THE INITIAL DETERMINATION OF ROYALTY ALLOCATION

Pursuant to the Copyright Royalty Judges' ("Judges") November 9, 2018 Order, the Joint Sports Claimants ("JSC") submit the following opposition to points 1-7 of Program Suppliers' November 2, 2018 motion for rehearing ("Motion") of the *Initial Determination Of Royalty Allocation* (dated October 18, 2018) ("2010-13 Decision").

Rehearing is a procedure limited to "exceptional cases." 17 U.S.C. § 803(c)(2)(A). It is "subject to a strict standard to dissuade repetitive arguments on issues that have already been fully considered by the [Judges].'" *Order Granting In Part And Denying In Part Sirius XM's Motion For Rehearing And Denying Music Choice's Motion For Rehearing*, Doc. No. 16-CRB-0001 SR/PSSR (2018-2022) at 2 (Apr. 18, 2018) (citation omitted) ("Sirius XM Rehearing Order"). Program Suppliers fall far short of meeting this standard. Therefore, Program Suppliers' Motion should be denied as was their similar rehearing motion in the 2004-05 Phase I cable royalty distribution proceeding. *See Order Denying Motions for Rehearing*, Doc. No. 2007-03 CRB CD 2004-2005 (July 19, 2010) ("2004-05 Rehearing Order").

A. Program Suppliers' Dissatisfaction With The Crawford Regression Is Not A Proper Ground For Rehearing (Points 1 and 2)

Program Suppliers criticize the use of the Crawford regression as the "starting point" for allocation determinations. *See* Motion at 4-5. Of course, JSC believe that the Judges should

have tied those determinations to the Bortz survey results, as their predecessors did, and not to the Crawford results. But whatever one thinks of the Crawford regression, the Judges' reliance upon that methodology does not provide a proper basis for rehearing. Program Suppliers had ample opportunity to, and did in fact, argue against the use of the Crawford regression during the twenty days of trial and in their proposed findings. Points 1 and 2 of the Motion are "based on the same view of the evidence that caused [Program Suppliers'] similar arguments to be rejected" in the 2010-13 Decision and thus do not warrant rehearing. 2004-05 Rehearing Order at 2. "A rehearing motion does not provide a vehicle to . . . '. . . raise arguments . . . that could have been raised prior to the entry of judgment.'" Sirius XM Rehearing Order at 2 (citation omitted).

B. The Judges Reasonably Explained Their Allocation Determination (Point 3)

Program Suppliers' claim that the Judges failed to "explain[] how they determined each party's shares" (Motion at 6) is wrong. The Judges made clear that they used the "point estimates [in the Crawford duplicate minute analysis] as the starting point" for the JSC, Program Suppliers, PTV and CTV awards; they then adjusted those estimates downward to account for upward adjustments in the SDC and CCG shares. *See* 2010-13 Decision at 118. That explanation adequately describes how the Judges made their allocation determination. With the single exception of the SDC awards, all awards are within about one or two percentage points of the Crawford estimates.

C. The Judges' Treatment Of SDC Does Not Support Rehearing Or An Increased Award To Program Suppliers Alone (Point 4)

As Program Suppliers note, the Judges awarded SDC more than 600% (about 4.5 percentage points or nearly $40 million) more than their Crawford shares. *See* Motion at 7 n.30. The Judges stated that they made "a modest upward adjustment" to Crawford's SDC allocation

"based on the Horowitz survey results and the Augmented Bortz survey results, together with testimony concerning the 'niche' value of devotional programming." 2010-13 Decision at 118.[1] Program Suppliers argue that they too should have received more than their Crawford shares because their Horowitz survey shares were greater than their Crawford regression shares. *See* Motion at 7-8. Regardless of the merits of Program Suppliers' argument, they have failed to show that the issues concerning the elevated SDC awards present the type of "exceptional case" (involving "clear error" or "manifest injustice") that warrants rehearing. *See* 2004-05 Rehearing Order at 1.

Even if the Judges agreed with Program Suppliers' argument, it would be inappropriate to increase the awards to Program Suppliers alone, which is what Program Suppliers appear to request. Indeed, as Program Suppliers correctly observed, the Horowitz survey results are "roughly corroborative" of JSC's Crawford shares. *See* Motion at 7. The Augmented Bortz survey results also are corroborative of the Crawford results for JSC. *Compare* 2010-13 Decision at 65 (Table 11) *with id.* at 15 (Table 2). Thus, at the very least, JSC's awards should not have been less than their Crawford shares. The Judges, however, awarded JSC an average of *two percentage points less* than their Crawford share for each year. *Compare id.* at 119 (Table 19) *with id.* at 15 (Table 2). The downward adjustment of Crawford's results was greater for

[1] As Program Suppliers indicate (Motion at 8), it is unclear why the Judges chose to rely upon the survey results rather than the Crawford results in setting the SDC awards after concluding that Crawford's analysis is "the most persuasive methodology overall on this record" and a "stronger base [than the surveys] on which to make the category allocation determination." 2010-13 Decision at 118, 80. Equally unclear is why *the specific SDC awards are approximately two full percentage points higher than the SDC share in the 2013 Horowitz survey and equal to or slightly below the SDC survey shares in the other years.* They also are higher than the SDC shares in the Augmented Bortz surveys for every year. In the 2004-05 proceeding, the Judges concluded that SDC should receive an award that was only about one half of their Augmented Bortz survey share given the amount of non-compensable programming on WGNA and the regression results. *See* 2004-05 Final Determination, 75 Fed. Reg. 57063, 57074 (Sept. 17, 2010) ("2004-05 Determination"). The Judges do not identify the specific "testimony" concerning "niche" value on which they were relying for the SDC awards. However, in the 2004-05 proceeding, the Judges squarely rejected reliance upon "anecdotal" testimony offered by SDC when awarding SDC significantly less than their Augmented Bortz shares. *See* 2004-05 Determination, 75 Fed. Reg. at 57075. The 2010-13 Decision does not discuss the Judges' departure from the 2004-05 Determination in setting the SDC awards.

JSC than for Program Suppliers or any other party.[2] If Program Suppliers are entitled to an increased award under the theory advanced in their Motion at 7-8, so too are JSC.

D. The Judges' Decision To Reallocate The "Other Sports" Category Reflects A Methodological Choice To Correct A Significant Flaw In The Horowitz Surveys And Does Not Warrant Rehearing (Point 5)

The Judges discussed substantial record evidence demonstrating the significant problems with Horowitz's "Other Sports" valuations. *See* 2010-13 Decision at 73-74, 78-79. Based upon that evidence as well as other record evidence not addressed in the 2010-13 Decision, the Judges could properly have refused to accord any weight whatsoever to the Horowitz survey results; that is the course that the record supported.[3] Instead, the Judges "reallocated" the "Other Sports" "points" among all the program categories "in proportion to the relative values established outside the Other Sports category." *See* 2010-13 Decision at 79. While Program Suppliers argue that the Judges should have "reallocated" those points to the Program Suppliers and CTV only (Motion at 8-9), the Judges' choice of methodologies to deal with a well-documented flaw in the Horowitz surveys is not a proper subject for rehearing.

Furthermore, Program Suppliers simply fail to comprehend the basis of the Judges' decision to "reallocate" the "Other Sports" "points." Program Suppliers claim that only they and CTV "could have had programming attributable to the Other Sports Category." Motion at 8. However, as the Judges correctly concluded, "Horowitz's inclusion of Other Sports created a

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[2] *See* Motion at 8 n.37 ("The Horowitz Survey also compelled a downward adjustment to the PTV shares"). For example, PTV's 2010 award was only about *0.6 percentage points less* than its 2010 Crawford share. *Compare* 2010-13 Decision at 119 (Table 19) *with id.* at 15 (Table 2). However, PTV's 2010 augmented Bortz and Horowitz shares were *more than seven percentage points less* than its 2010 Crawford shares. *Compare id.* at 65 (Table 11) *and id.* at 79 (Table 15) *with id.* at 15 (Table 2). In each of the remaining years, the PTV shares in both the Horowitz and augmented Bortz surveys were between approximately *2.5 to 12.1 percentage points less* than PTV's shares in the Crawford study, while PTV's awards were only about *1.2 percentage points less* than PTV's Crawford shares.

[3] *See* JSC PFOF ¶¶ 122-45. If the Judges do order a rehearing on the "Other Sports" issue, the parties should also be allowed to argue that the Judges erred in reallocating the "Other Sports" valuations rather than striking the Horowitz survey altogether as the record supported.

value *where none, or next to none, existed*." 2010-13 Decision at 79 (emphasis added); *see id.* at 78 (Horowitz "threw a curve ball by including an 'Other Sports' category when there may have been little to no 'other sports' content . . ."). Indeed, the fundamental problem with the Horowitz "Other Sports" category was not simply that "Other Sports" programming may come within both the Program Suppliers' and CTV categories, as Program Suppliers claim. *See* Motion at 8. It was that Horowitz asked respondents to assign value to programming that they simply did not carry (or carried an infinitesimal amount of) on a compensable basis.[4] Because it was inappropriate to have respondents value "Other Sports" programming they did not retransmit on a compensable basis, the fact that only the Program Suppliers and CTV may own such programming is irrelevant.

E. The Judges' Rejection Of A Last Minute "New Analysis" By Dr. Gray Does Not Constitute Grounds For Rehearing (Point 6)

On January 22, 2018 at 10:06 pm, less than two weeks before the scheduled start of trial, Program Suppliers filed Dr. Gray's "Third Errata to Amended and Corrected Written Direct Statement and Second Errata to Written Rebuttal Statement Regarding Allocation Methodologies" ("Third Errata"). The Judges subsequently struck the Third Errata because it was a "new analysis," "not merely an effort to correct typographical errors or minor discrepancies," and was filed "too late" in the proceeding. Tr. 232 (Barnett, C.J.); 2010-13 Decision at 85. Because Program Suppliers have already had a full opportunity to make their

[4] There was at best only a modest amount of compensable "Other Sports" programming in the non-network distant signal marketplace, and the most widely carried distant signal, WGNA, carried virtually no "Other Sports" programming. *See* JSC PFOF ¶ 124. Respondents who carried WGNA as their only commercial distant signal accounted for nearly half of all Horowitz respondents asked to value "Other Sports." *See id.* ¶ 125. Yet despite the paucity of "Other Sports" programming, Horowitz not only included a separate "Other Sports" category, but also provided respondents with misleading and incorrect examples suggesting that they imported even more "Other Sports" programming. *See id.* ¶¶ 124-26.

arguments concerning exclusion of the Third Errata, the Judges' decision to exclude it does not constitute grounds for rehearing.

Furthermore, the Judges' 2010-13 allocations would not change even if the Judges had not excluded Dr. Gray's "new analysis" in the Third Errata. Dr. Gray and Program Suppliers advocated the use of "viewership" as a direct measure of value. However, consistent with established precedent and the record, the Judges correctly rejected this argument: "The Judges conclude, therefore, that viewership, without any additional evidence to account for the premium that certain categories of programming fetch in an open market, is not an adequate basis for apportioning relative value among disparate program categories." 2010-13 Decision at 97. The Third Errata contained only an analysis of viewership data and thus was irrelevant to the outcome of this proceeding.[5]

None of the arguments advanced by Program Suppliers concerning the Third Errata supports rehearing. ***First***, it is misleading for Program Suppliers to say that they were precluded from correcting the erroneous WGNA data that underlies Dr. Gray's original testimony. *See* Motion at 9. As noted above, the Judges properly found that the Third Errata constituted a "new analysis," not merely a correction of erroneous WGNA data. Indeed, nowhere in the Third Errata does Dr. Gray simply correct the data that underlies his original analysis; there is nothing in the Third Errata showing what that analysis would look like with the purportedly correct WGNA data. Rather the Third Errata ran the purportedly corrected data through a new regression methodology and a new methodology for weighting viewership data, in an apparent

[5] The Judges also found it unnecessary to consider a number of additional methodological challenges to the Gray WDT—many of which were not addressed in the Third Errata—because they "found an adequate basis for rejecting Dr. Gray's viewing study based on its failure to provide a complete measurement of value, and its reliance on incomplete data." 2010-13 Decision at 98.

attempt to compensate for the effects of the corrected data on Program Suppliers' share of viewing.

Second, Program Suppliers were not treated differently from other parties, as Program Suppliers claim. *See* Motion at 9. When SDC attempted to introduce new testimony, the Judges likewise prohibited SDC from doing so. *See Order Denying SDC Motion for Leave to Supplement Written Rebuttal Testimony of Dr. Erdem*, Doc. No. 14-CRB-0010-CD (2010-13) (Feb. 8, 2018). Conversely, when Program Suppliers sought to do no more than correct an error in a witness' testimony, they were not precluded from doing so. *See, e.g.*, *Errata to Amended and Corrected Written Direct Statement Regarding Allocation Methodologies of Program Suppliers*, 14-CRB-0010-CD (2010-13) (Apr. 3, 2017).

Third, nowhere in the Motion do Program Suppliers even acknowledge that the filing of the "Third Errata" was inexcusably late. Program Suppliers were on notice by no later than September 15, 2017 that the data in Dr. Gray's testimony was incorrect.[6] Yet, Dr. Gray did not submit the purported Third Errata until January 22, 2018, more than four months later. Moreover, Mr. Lindstrom testified that Nielsen had confirmed the problems with the data on which Dr. Gray had relied by the beginning of December 2017, almost two months before the filing of the "Third Errata".[7] Tr. 3637-38 (Lindstrom). And, as noted, Program Suppliers submitted the Third Errata two weeks before the scheduled start of trial. Program Suppliers have not cited any authority mandating the acceptance of late-filed evidence under such circumstances; the authority is to the contrary. *See, e.g., Settling Devotional Claimants v.*

[6] Specifically, JSC witnesses Dr. Wecker and Mr. Harvey attached to their written rebuttal testimony a separate data run from Nielsen showing far more distant viewing on WGNA than indicated by the data relied upon by Dr. Gray. *Compare* Ex. 1089, App. G *with id.*, App. C & D; JSC PFOF ¶ 167.

[7] Indeed, cross-examination of Dr. Gray at trial revealed that Dr. Gray and counsel for Program Suppliers were aware of potential problems with their dataset as early as September 2016, before Dr. Gray submitted his written direct testimony. Tr. 4046 (Gray); *see* JSC PFOF ¶ 166.

Copyright Royalty Bd., 797 F.3d 1106, 1113, 1119-20 (D.C. Cir. 2015) (affirming the Judges' decision to exclude a study SDC submitted for the first time in rebuttal three weeks before trial to prevent "trial by ambush").

Finally, exclusion of the Third Errata was not an "extreme sanction" tantamount to excluding an expert's report in its entirety, as Program Suppliers claim. *See* Motion at 10 n.46. The Judges did not strike the entirety of Dr. Gray's testimony on viewing. They simply precluded the introduction of the "new analysis." The remainder of his testimony was in the record, Dr. Gray testified extensively at trial, and the Judges discussed the testimony for twenty pages in the 2010-13 Decision. Program Suppliers' cited authority, *id.*, which exclusively deals with expert reports struck in their entirety, is inapposite.

F. Rehearing Is Not Appropriate Simply Because The Judges Did Not Discuss The Mansell "Changed Circumstances" Testimony (Point 7)

There is no basis for rehearing on the ground that the Judges "failed to discuss" John Mansell's so-called "changed circumstances" testimony. *See* Motion at 10. As the Judges concluded in the 2004-05 proceeding, where Program Suppliers presented virtually identical testimony from Mr. Mansell:

> [C]hanged circumstances are embedded within the methodologies that provide reliable estimates of relative valuations and, therefore, have already been accounted for and are subsumed within the calculus of results.

2004-05 Determination, 75 Fed. Reg. at 57070 n.18, *citing* Report of the Copyright Arbitration Royalty Panel to the Librarian of Congress, Doc. No. 2001-8 CARP CD 99-99 at 16, 31-32 (Oct. 21, 2003). The quantitative market analyses of relative market value presented in the surveys and regressions that the Judges did consider account for whatever changes occurred within the distant signal marketplace between 2004-05 and 2010-13. *See* Exhibit 1087 (Israel) ¶ 64.

Moreover, Mr. Mansell's repeat testimony does not support any change in the JSC allocation. While Program Suppliers argue that Mr. Mansell's testimony demonstrated "an overwhelming reduction in available JSC content on broadcast signals during the pertinent years" (Motion at 10), Mr. Mansell failed to measure changes in the relevant non-network distant signal marketplace. The uncontroverted record demonstrates that in the relevant marketplace the relative volume of JSC programming remained relatively stable, while the relative volume of Program Suppliers' programming declined significantly, between 2004-05 and 2010-13. *See* JSC PFOF ¶¶ 91, 149-50. In particular, the relative amount of compensable JSC programming on WGNA, the most widely carried distant signal during 2010-13, *increased*, while Program Suppliers' relative share *decreased*, between 2004-05 and 2010-13. 2010-13 Decision at 77, 85. To the extent that Program Suppliers believe that a "reduction in available . . . content on broadcast signals" is relevant to determining royalty shares (Motion at 10), such changes support a Program Suppliers' 2010-13 royalty share significantly lower than their 2004-05 share.

CONCLUSION

For the above reasons, Program Suppliers' Motion should be denied.

Respectfully submitted,

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November 19, 2018

Proof of Delivery

I hereby certify that on Monday, November 19, 2018 I provided a true and correct copy of the Opposition of the Joint Sports Claimants to Program Suppliers' Request for Rehearing of the Initial Determination of Royalty Allocation to the following:

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